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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

ANDI PALGUNADI,
Petitioner,

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

LAW OFFICES OF VALERA & ASSOCIATES
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Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A72 167 696 – Baltimore Date: May 15, 2006

In re: ANDI PALGUNADI

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Arnedo S. Valera, Esquire

ON BEHALF OF DHS: Billy J. Sapp, Assistant Chief Counsel

In a decision dated January 31, 2005, an Immigration Judge denied the respondent's applications for asylum, withholding of removal, and relief pursuant to the Convention Against Torture. The respondent was ordered removed to Indonesia, should he fail to avail himself of voluntary departure. The appealed the Immigration Judge's decision. The appeal will be dismissed.

We affirm the decision of the Immigration Judge and find no error in the denial of the relief sought. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision").

The motion to remand is denied. A 3rd preference employment-based visa petition (skilled worker) was filed on the respondent's behalf on December 19, 2005 and it has yet to be adjudicated. In circumstances such as these, we decline to remand cases on the basis of an unadjudicated work visa.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted voluntarily to depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). See section 240 (B)(b) of the Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails so to depart, he shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, he shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

(Signed)

Anthony C. Moscato

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Baltimore, Maryland

File A 72 167 696 January 31, 2005

In the Matter of

ANDI PALGUNADI,
Respondent

CHARGE: Section 237(a) (1) (B) of the Immigration and Nationality Act, a nonimmigrant overstay

APPLCATIONS: Section 208 of the Immigration and Nationality Act, withholding of removal; Article 3 Convention Against Torture withholding of removal; alternatively Section 240B of the Immigration and Nationality Act, voluntary Departure

ON BEHALF OF RESPONDENT: ON BEHALF OF DHS:

Arnedo Valera, Esquire Billy Sapp
Assistant District Counsel

BENCH DECISION AND ORDER OF THEIMMIGRATION JUDGE

The respondent has appeared before the United States Immigration Court at Baltimore, Maryland, this date, and has presented his applications for relief from removal and deportation. Those applications include an application of asylum under Section 208 of the Immigration and Nationality Act, withholding of removal under Section 241(b)(3) of the

Immigration and Nationality Act, protection under the Convention Against Torture Article 3 withholding of removal, and in the alternative, voluntary departure under Section 240B of the Immigration and Nationality Act.

Those applications have now been duly considered by the Court and all testimony and all evidence that has been received into this record has been considered, even if not specifically discussed below. The decision and order of this Court follows.

STATEMENT OF THE CASE

The respondent is a native and a citizen of the country of Indonesia. He arrived in the United States at Detroit, Michigan on November 1, 1999, as a nonimmigrant vocational or non-academic student with authorization to remain in the United States for a period of time not to exceed October 31, 2000. The respondent has testified that he specifically came to the United States for the purposes of renewing his air pilot license.

The respondent remained in the United States beyond the date permitted to him, and has continued to remain in the United States beyond October 31, 2000 in violation of the United States immigration law without permission to remain.

The respondent does not dispute the factual allegations within the Notice to Appear and has conceded to the charge of removability. Based upon those admissions, the Court has found that he is subject to being removed and deported to his country, Indonesia.

The respondent never filed an application for asylum or withholding of removal after his arrival in the United States. But only raised this as a defense in pleading proceedings before the Court in December of 2003. The

application is a defensive application, as it has been filed with the Court. The Court sought a State Department advisory opinion in accordance with the regulations and the State Department responded by referring the Court to the current Country Report on Human Rights Practices for Indonesia. The Court has reviewed that report and it is made a part of this record.

TESTIMONY AND EVIDENCE PRESENTED

The respondent claims that in addition to coming to the United States to renew his pilot's license, he also came in the hopes of staying here permanently. He told the court that he and his family could not live peacefully in Indonesia. He advised the Court that as a Muslim and a member of an Islamic religion in his country, the Islamic extremists had threatened him and threatened his wife.

As a pilot for the government of Indonesia, flying high ranking officials, the respondent testified to the court of incidents of threats against employees, in particular, pilot and crew persons. The respondent's spouse, who gave witness in this case, confirmed and corroborated that, as she too was a member of the airline crew.

The respondent claims that after his contract expired with the government as a pilot, he decided not to continue to work because he believed that the work was dangerous. He then went into business for himself, and while in business for himself, he testified of incidences of threats by individuals who sought to extort monies from his business. The individuals also were believed to be part of the Islamic extremists of his country.

Specifically, the respondent advised the Court that he was fearful for his well-being and the well-being of his family from the Jemaat Islamiah. This organization along with the

Islam Jama-ah, are extremist organizations that have created havoc and violence against others in Indonesia. In fact, the Jemaat Islamiah is a prescribed organization on the United States' list of prescription groups and organizations, terrorist groups and organizations.

In his testimony and affidavit, the respondent mentions a few incidences other than the threats and extortion from his business and the danger of flying for the government. He gave an accounting in his affidavit and his testimony of an incident that occurred at an ATM machine, and how there was a confrontation with several individuals, who the respondent believed were a part of this extremist group.

The respondent recognizes that he did not file a timely asylum application. However, in general argument, it is his request that an exception be made that the asylum application be adjudicated along with other applications.

In support of his application, the respondent presents to the Court his application, his personal statement, biographical information, a copy of his passport and arrival document, and general background information. In addition, he has provided to the Court evidence of his employment and his wife's employment for the airline, and also has provided to the Court his testimony and the proffered testimony of his spouse. See respondent's Group Exhibit A, sub-exhibits A1 through A7.

The Court has summarized the claim presented. However, for purposes of disposition, it incorporates as part of the respondent's testimony, his affidavit as found at Group Exhibit A, sub-exhibit A3. The affidavit will not be read into the record.

The respondent argues that he is a refugee from his country, entitled to asylum, withholding of removal. He has also made a general argument that not withstanding the fact that his claim of feared persecution is not at the hands of the government, that he may be considered for protection under the Convention Against Torture.

Alternatively, the respondent has requested voluntary departure.

The Department of Homeland Security opposes the applications for asylum, withholding of removal, protection under the Convention Against Torture. Firstly, the Department argues the respondent is time barred from asylum. Secondly, the Government argues that the respondent has failed to meet his burden of proof, has failed to establish a nexus between his fear of an Islamic extremist group and a protected ground.

The protected grounds advanced by the respondent are religion, membership in a particular social group.

STATEMENT OF THE LAW

For the respondent to be granted asylum in the United States, he must meet the legal definition of refugee found at Section 101(a)(42)(A) of the Act. His evidence must establish past persecution and/or a well-founded fear of future persecution on account of a protected ground. There must be a nexus between the feared persecution and the protected ground.

In this case, as noted, the protected grounds are religion and membership in a particular social group. In determining whether or not an individual meets his burden of proof, the Court looks at the country at issue and its human rights record. It applies a reasonable person standard, giving

due consideration to subjective fears that are expressed, provided they are genuine and supported by objective facts.

Individuals who have been subjected to past persecution are deemed to have a well-founded fear of future persecution absent changed circumstance. Protection under Section 241(b)(3) of the Act, to-wit: withholding of removal, enhances the burden of proof of the respondent. No longer is it sufficient to establish a well-founded fear of being persecuted. now the respondent must show that persecution more than likely will occur. The evidence must show a clear probability that the persecution on account of a protected ground most likely will occur. That his life and his freedom will be placed in danger if he is required to return to his homeland.

Likewise, protection under the Convention Against Torture, Article 3 withholding of removal, requires that the respondent show that it is more likely than not that if he returns to his country, he will be subject to torture within the meaning of that term And torture is defined at Article 1 of the Convention Against Torture and also at 8 C.F.R. 208.18(a)(1). The torture must come at the hands of the government.

In this case, the tortured would come from the Indonesian government. The respondent, of course, has not indicated in his written record or his testimony that he fears, the government. To the contrary, the respondent worked for the government of Indonesia. Torture continues to be defined also that the torture is inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or other persons acting in an official capacity. Thus, there must exist a knowing acquiescence and not and does not cover groups or organizations that the government is unable to control.

This court has examined all of the testimony in evidence, consistent with case law, our regulations and of course our statute.

And the cases the Court has examined the testimony and evidence under, include the cases of Stevic, 1984 the Suprem Court; Cardoza-Fonseca, 1987 the Supreme Court; Elias-Zacarias 1992, the Supreme Court. The cases of Aragic and Ennin 1998, Fourth Circuit Court of Appeals precedent decisions, which include the following, Matter of Acosta, Matter of Mogharrabi, Matter of Dass, Matter of S-M-J-, Matter of M-M-A, Matter of S-V-, Matter of J-E-, and cases cited therein.

FINDINGS OF THE COURT

After careful review of the testimony and evidence, the Court decides as follows. The Court addresses its findings directly to the respondent and his family.

Mr. Palgunadi, I am satisfied that you and your wife and your family came here for a better life, so that you did not have to live in the uncertainties of your own nation. I am satisfied you came here with the hope and the opportunity to live peacefully and to live freely and to provide a better life for your family, in particular, your children. I am also satisfied that you and your family are good people, and I am sympathetic to your plight. But sympathy is not the test of eligibility for the relief that you seek before this Court.

You are not a refugee within the meaning of our statute, and therefore, you cannot be protected under the refugee laws of the United States. Indonesia, as a nation, is no on trial before this court, and the difficulties that the Indonesian government has with Islam extremists is not on trial before the Court.

The issue before the Court s whether or not you are truly a refugee within the meaning of that term, and as envisioned by our law, and you are not. You are not because you do not satisfy the statutory or regulatory requirements of the law. Nor does you case fit within the cases of precedence that I have referenced.

Firstly, you did not make an application for asylum timely under the law. The law is clear. An application for asylum must be made within a year of the arrival of the individual. Your application was filed many, many yards after your arrival in the United States. Secondly, the law says you maybe entitled to an exception, and the exception would be change circumstance or extraordinary circumstance. There are no extraordinary circumstance. I am aware form your attorney that you were seeking to legalize your status in the United States under a sponsorship of employment. But that does not excuse the application being filed within a year.

Nor are there changed circumstances in your case. The reasons that you apply for asylum today before the Court, are the same reasons for coming to the United States in 11999, among others.

So there is no exception and because there is no exception, your application is time barred, and this Court cannot consider your asylum request.

Your application for withholding of removal under the Convention Against Torture fails because you do not fear your government. There is no evidence that your government would torture you. In fact, you worked for your government and in fact you went to your government when there was an incident of extortion against you. You reported the incident to the police. Nor has the government acquiesced with any public official or these organization. In fact, the government

seeks to bring to justice these extremist organizations that cause violence and intimidation and ruthless acts against it.

The withholding of removal application under Section 241(b)(3) also fails, because there is no evidence in this record that it is more likely than not that if you returned to your country, your life and freedom will be placed in danger on account of your religion or your membership in a particular social group.

If the social group is an airline pilot for the government, you no longer posses that immutable characteristic. In fact, you found the job too dangerous and left it. This is exactly the ruling in Matter of Acosta. If your membership in a particular social group is that you are a member of a Muslim set, that is confronted by the extremist, this does not satisfy the legal test either. Because there is no evidence to show the Court that you were singled out to be persecuted for your religious affiliation and belief. You were threatened, not because of your religion, but because you worked as a pilot for the government. You were extorted because you owned a business and these individuals sought to take some of your monies.

The law requires that the Court review, not the opinion or the religion or the membership of the persecutor, but rather that of the victim, and there is nothing in this record to indicate that you have ever been targeted or singled out because of how you are, because of what your religious belief is, because of what your past employment may have been.

Regrettably, these are unfortunate incidences and in most, if not all cases, criminal instances that have occurred that have scarred you and your wife and your children, to the point where you did not feel completely safe in your country. But the evidence does not meet your required burden of proof, because there is no nexus between your fear, which I

believe to be genuine and the protected grounds under our law.

Your case fails under the Supreme Court decisions that I have mentioned above. It also fails under the fourth Circuit Court of Appeals precedent decisions regarding burden of proof that I have mentioned above, and it also fails under the legal tests of the Board of Immigration Appeals cases that I have addressed as well.

Mr. Palgunadi, I find that in the instant case, you are not a refugee within the meaning of that term, that you have not made an application timely, that there is no evidence of past persecution and/or a well-founded fear of future persecution on account of a protected ground. I also find for the reasons that I have stated that your application is not proper under the Convention Against Torture, and the intent of that convention and our obligation to that convention.

These applications, therefore, must be denied.

I also find that you satisfy the legal requirements of voluntary departure, both as a matter of law and as a matter of discretion and that application will be approved.

COURT ORDERS

It is this 31st day of January 2005, by the United States Immigration Court jurisdiction Baltimore, Maryland ordered that the applications for asylum under Section 208 of the Immigration and Nationality Act, withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act, protection under the convention Against Torture withholding of removal be, and are herein denied.

That the application for voluntary departure under Section 240B of the Immigration and Nationality Act be, and

is herein granted, on or before 1 April 2005, upon posting a departure bond in the amount of $500 on or before February 7, 2005. If the voluntary departure conditions of this order are violated, without further notice and/or proceedings, the respondent shall be removed and deported to his country, Indonesia.

JOHN F. GOSSART, JR.
Immigration Judge